native court, the appellant in by-passing his right of appeal to the Native Court of Appeal, claimed for declaration that the native court was *functus officio* and without jurisdiction. It was argued that the plaintiff was not obliged to go to the Native Court of Appeal. The Federal Court, following the principle in *Barraclough's* case, rejected the argument and held that the court (High Court) would not make a declaratory judgment when an adequate alternative remedy is available.

In *Metal Industry Employees Union* v. *Registrar of Trade Unions & Ors.*,[14] the principle in *Manggai's* case was applied by the court. In that case the plaintiff applied for declaratory orders against the decision of the Registrar of Trade Unions where section 17(1) of the Trade Unions Ordinance, 1959 provides that an appeal against any opinion of the Registrar lies to the Minister. The court held that it should not be invited to make the declaration sought since an alternative remedy was clearly prescribed by law.

For these reasons, in my opinion, the plaintiff's claims at prayers (i) and (ii) are premature and the claim at prayer (iii) is hypothetical in nature since the law clearly provides an alternative remedy for an appeal to the Minister. The same considerations apply to the remaining declarations at prayers (iv), (v) and (vi) though not specifically dealt with in my ruling but they were kept in my view. I would, therefore, allow this objection and the claim is dismissed and struck out. Costs to the defendants.

Order accordingly.

TAN AH LEK v. GURCHARAN MUNTARA SINGH

[A.C.J. (Chang Min Tat J.) April 16, 1977]
[Kuala Lumpur — Civil Appeal No. 6 of 1977]

Practice and Procedure — Default judgment — Setting aside — Service by registered letter — Letter returned unclaimed — Merits in defence — Defence should be allowed without conditions — Subordinate Court Rules, 1950, O. VIII, r. 5.

In this case judgment had been entered against the appellant in default of appearance and defence. His application to set aside the judgment was allowed but conditional on his payment into court of a sum of $5,000, the amount estimated of the claim. Since he did not comply with this condition, judgment was entered against him. The appellant appealed to the High Court. It appeared that service of the summons had been effected by registered letter. That letter was not delivered or received and it was returned unclaimed.

Held: (1) in the circumstances of the case it was not possible to contend that service had been properly effected or at all or that there was evidence to show that the defendant had refused service;

(2) it is never the practice of the courts, where there are merits in a defence, that the defence would be allowed conditional upon the payment into court of the subject-matter of the claim.

CIVIL APPEAL.

Mrs. Jegathesan for the appellant.

Tee Keng Hoon for the respondent.

Chang Min Tat J.: The appellant had a judgment given against him in default of appearance and defence. His application to set aside this judgment was allowed but conditional on his payment into court a sum of $5,000, the amount estimated of the claim. Since he did not comply with this condition, judgment was entered against him. He now appeals to this court.

Service of the summons on him was effected by registered letter. That letter was not delivered or received and it was returned unclaimed. The learned President upheld the contention of the plaintiff that that constituted good service. Order VIII rule 5 of the Subordinate Court Rules provides that service should be effected by prepaid registered post. Service by ordinary registered post is therefore not in compliance with the order. There is good reason for the rule since by a prepaid registered letter there would be returned to the sender a card indicating either that the letter had been delivered or that the addressee had refused service, if in fact he had refused service. It is not correct to say that "unclaimed" can be equated with "refused delivery." It is elementary that the defendant should be served with the summons so that he should know what the claim against him is and decide for himself whether to defend or not. Where service has not been effected or where it cannot reasonably be presumed, from the circumstances of the case, that service was or would have been effected, but for the wilful refusal on the part of the defendant to accept service, the defendant is entitled *ex debito justitiae* to have the judgment set aside. In the circumstances of this case, I do not think it is possible to contend that service had been properly effected or at all or that there is evidence to show that the defendant has refused service. The judgment must be set aside.

It is not strictly necessary that I should deal with the second ground of appeal, which is that he should be given leave to defend without conditions. But perhaps it is salutary that I do so. The learned President found merits in the defence, but nevertheless imposed the condition. Why, I am not able to discern from the grounds of decision, but it apparently sprang from the finding that the defendant was at fault in refusing service. But it is never the practice of the courts, and I do not think it ever will be the practice that, where there are merits in a defence, the defence would be allowed conditional upon the payment into court of the subject-matter of the claim. Where the failure to effect service is caused by reason of some wilful default on the part of the defendant or where the defendant now seeks to defend, the plaintiff can always be compensated by an order for costs but no condition should be imposed where the defendant can raise a defence on merits.

The appeal was allowed with costs. The default judgment was set aside, and the case remitted to the learned President to hear it on the merits.

Appeal allowed.

Solicitors: *Jegathesan & Co.; Allen & Gledhill.*